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**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
IN AND FOR CACHE COUNTY, STATE OF UTAH**

JERRY D. OLDS
STATE ENGINEER,

Plaintiff,

v.

THELMA AND JERRY CHARLES
SIMMONDS

Co-Defendants.

**STIPULATED FINAL ORDER OF
PERMANENT INJUNCTION AGAINST
THELMA AND JERRY CHARLES
SIMMONDS**

Judge Gordon J. Low

Civil No. 040101687 WR

On August 13, 2004, Plaintiff, Jerry D. Olds, Engineer for the State of Utah ("State Engineer"), filed a complaint against water users Thelma and Jerry Charles Simmonds ("Simmondses"), seeking injunctive and other equitable relief for violations of the Water and Irrigation Act, as amended, UTAH CODE ANN. §§ 73-1-1 et seq (West Supp. 2004). On August 13, 2004, this Court entered a temporary restraining order against the Simmondses. On August 26, after an evidentiary hearing was held the previous day, this court entered a preliminary injunction against Mr. Simmonds. On

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September 20, 2004, the parties stipulated to a preliminary injunction against Ms. Simmonds, and on October 5, 2004, this court issued the preliminary injunction.

On March 15, 2005, this matter came before this court for trial. Heather B. Shilton appeared on behalf of the State Engineer. Mr. Robert Fotheringham and Will Atkin appeared as expert witnesses for the State. The Simmondses appeared and were represented by Mr. Arden Lauritzen. Several motions were outstanding: Defendants' Verified Motion to Implead Additional Defendants as Indispensable Parties; Defendants' Verified Motion for Enlargement of Time to Address Plaintiff's Motion for Summary Judgment and Plaintiff's Response to Defendant's Motion for Partial Summary Judgment; Defendants' Motion for Partial Summary Judgment; State Engineer's Motion to Strike and in the Alternative, Motion for Summary Judgment.

The court had considered the Complaint, the *Kimball* and *Dietrich* Decrees, motions, exhibits, testimony presented at the hearing for the preliminary injunction, and trial briefs. In making its bench decision denying Defendants' Verified Motion to Implead Additional Defendants as Indispensable Parties, the court determined that there was no reason to not issue the permanent injunction. Therefore, rather than argue the remaining outstanding motions, including the parties' motions for summary judgment, or proceed with trial, the parties stipulated to a permanent injunction. Based upon the parties' stipulation, in which Defendants agreed shall contain, among other provisions, the findings of the preliminary injunctions and temporary restraining orders,

THE COURT FINDS THAT:

1. Plaintiff is the duly appointed State Engineer of Utah and is the Director of the Division of Water Rights ("Division").
2. The State Engineer is charged with the general administrative responsibility over the water of the State.
3. The legal doctrine of prior appropriation is codified in Utah law.
"Appropriators shall have priority among themselves according to the dates of their respective appropriations, so that each appropriator shall be entitled to receive his whole supply before any subsequent appropriator shall have any right." Utah Code Ann. § 73-3-21 (West Supp. 2004).
4. Under the final decree of the Court in the case *Utah Power & Light Company v. Richmond Irrigation Company*, ("Kimball Decree") the Bear River Canal Company ("Canal Company") holds March 1, 1889 priority rights for 333 c.f.s. of natural flow in the Bear River, as well as other water rights for a total flow of 604 c.f.s.
5. The Simmonds own equitable title in a parcel of property located in Section 22, Township 14 North, Range 1 West.
6. Jerry Simmonds and Thelma Simmonds own equitable title to Water User's Claim Nos. 25-6627, priority date May 1, 1918.
7. Jerry Simmonds owns equitable title to Water User Claim No. 25-6628, priority date May 1, 1918.

8. The Simmondses lease Water User's Claim Nos. 25-6917, priority date June 12, 1920, owned by Topaz Marketing Limited Partnership.
9. The Simmondses Utah Power and Light Distribution Account number is 100870 (reference 24.114 or #A14).
10. Water User's Claim Nos. 25-6627 and 25-6628, by their terms are limited to the irrigation flow of 3.0 cfs, respectively.
11. The Canal Company's right is senior in priority to the natural flow water rights of all other Utah users of supplemental storage water out of Bear Lake, including the Simmondses, with the exception of miscellaneous rights totaling approximately 5.0 c.f.s.
12. Utah codified the Bear River Compact, an interstate agreement between the State of Utah, the State of Idaho, and the State of Wyoming.
13. The Utah interstate distribution model for the Lower Bear River was developed to distributed the natural flow of the Bear River and account for storage releases from Bear Lake to diversions in Idaho and Utah.
14. Distribution is by priority using diversion and stream flow records collected by the Lower Bear River commissioner under the direction of the Utah State Engineer.
15. A similar water distribution model is used by the State of Idaho.
16. Natural flow is calculated using a reach-gain analysis, incorporating the travel times and transit losses from the *Kimball* and *Dietrich* Decrees.

17. By July 27, 2004, the Utah Small Irrigators had used 66 acre-feet of water in excess of their allocations.
18. The Simmondses received notice on several occasions that they were not legally entitled to pump, divert, and use water from the Bear River.
19. On August 2, 2004, the State Engineer sent a letter to the Utah Small Irrigators informing them that their allocations for the irrigation season had been delivered, and they must "immediately cease diverting and using water from the Bear River."
20. With the exception of the Simmondses, all of the Utah Small Irrigators were in compliance with the State Engineer's order, and not diverting water out of priority.
21. On August 6, 2004, the Bear River Water Commissioner tagged the Simmonds pump.
22. On August 6, 2004, Terry Gnehm, the Bear River Commissioner, personally informed Jerry Simmonds that he had received this water allocation for the 2004 irrigation season, but the Simmondses continued to divert and use water out of turn.
23. On August 9, 2004, Robert Fotheringham and Will Atkin, employees of the Division of Water Rights, observed the Simmondses' pump diverting water from the Bear River.
24. Mr. Fotheringham and Mr. Atkins tagged the pump and took digital photographs to document the diversion.

25. On August 10th and August 11th, 2004, Mr. Atkin observed the Simmonds pump operating and diverting water from the Bear River.
26. On August 13, 2004, this court issued a Temporary Restraining Order enjoining the Simmondses from pumping, diverting, and using water.
27. The water conditions in the Bear River area are critical. Utah is in a period of severe drought. The Simmondses unlawful use of water in excess of their water right exacerbates the critical problem of declining storage water in Bear Lake.
28. The Simmondses unlawful use of water in excess of his water right interferes with the ability of the State Engineer to perform his statutory duty under UTAH CODE ANN. § 73-5-3 (West Supp. 2004), which requires the State Engineer to "carry into effect the judgments of the courts in relation to the division, distribution or use of water."
29. The Simmondses had no legitimate justification for their unlawful use of water. Therefore, the balance of harm weighs against the Simmondses in this matter and is irreparable.

The Court HEREBY ORDERS:

1. The Simmondses' Verified Motion to Implead Additional Defendants as Indispensable Parties is denied.
2. The Simmondses and their officers, agents, servants, employees, and attorneys, and those persons acting in active concert with them are

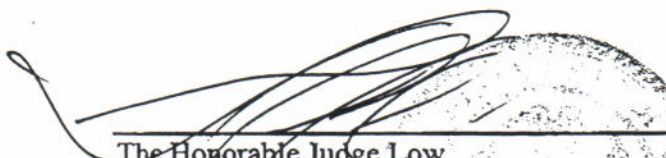
permanently enjoined from diverting water contrary to the laws of Utah, and shall obey all orders issued by the Utah State Engineer.


3. The remaining outstanding motions (Defendants' Verified Motion for Enlargement of Time to Address Plaintiff's Motion for Summary Judgment and Plaintiff's Response to Defendant's Motion for Partial Summary Judgment; Defendants' Motion for Partial Summary Judgment; State Engineer's Motion to Strike and in the Alternative, Motion for Summary Judgment) shall be consolidated into the General Adjudication of the Bear River, Case No. 8220, in the First District Court in and for Cache County, State of Utah.
4. The court shall consider the motions if and when Defendants are allowed to open a petition for a mini-adjudication in Case No. 8220 under UTAH CODE ANN. § 73-4-24 (West Supp. 2004).
5. If the Simmondses file a petition for a mini-adjudication in Case No. 8220, they shall properly serve all parties in the General Adjudication of the Bear River.
6. This permanent injunction shall be reconsidered when the adjudication, Case No. 8220, is finalized.
7. If the Simmondses violate any provision of this order, this court shall issue an order to show cause, requiring them to appear before the court and show why they should not be found in contempt, and the State Engineer awarded any other proper relief.

8. All future service of notice upon Defendants, including service of an order to show cause, shall be accomplished by certified mail to Mr. Lauritzen or his successors-in-interest at his business address, or pursuant to Utah Code Ann. § 73-2-25(5) (West Supp. 2005). Certified proof of receipt is not required.

Dated this 30th day of March, 2005

BY THE COURT


The Honorable Judge Low
District Court Judge



Approved as to form:

Arden Lauritzen
Attorney for Co-Defendants